(3)

No. 00-238

IN THE

Supreme Court of the United States

NAOMI TREECE,

Petitioner,

v.

STEVEN HOCHSTETLER and
CITY OF NAPERVILLE, ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

JOHN J. WITMEYER III
Counsel of Record
TODD S. COREY
FORD MARRIN ESPOSITO WITMEYER
& GLESER, L.L.P.
Attorneys for Petitioner
Wall Street Plaza
New York, New York 10005
(212) 269-4900

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ARGUMENT

I.

PETITIONER PROPERLY PRESERVED HER ARGUMENTS.

A plaintiff preserves her position on a legal issue by making that position known to the trial court. Contrary to respondents' argument, established law holds that once a plaintiff makes her position known on a legal issue and the trial court rules against her, she need not formallistically object every time the trial court adheres to its ruling. Petitioner had made clear to the District Court and the Court of Appeals that she contended that the City could have liability independently to that of Hochstetler if it maintained an informal "custom or policy" of permitting constitutional violations, despite the lack of malice. Petitioner also made clear her position that objectively unreasonable conduct, not malice, made out a "Fourth Amendment" type violation of Section 1983.

But, the trial court ruled on summary judgment that it would apply the Seventh Circuit's *Reed* standard, which required the petitioner as plaintiff, in order to make out a violation of Section1983, to prove both the Fourth Amendment "objective" unreasonableness of the defendants' conduct and the "subjective" malice elements of state malicious prosecution law. Thereafter, petitioner had no obligation to object to the continued application of *Reed* because Petitioner's position was well known to the District

Court. *See* FED. R. CIV. P. *46; see also, Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1060 (5th Cir. 1990) (argument not waived for lack of formal objection, where party's position on the applicability of a statute was known to the court); *Kraus v. Rhodes* 570 F.2d 563, 569 (6th Cir. 1977) (argument not waived on appeal, where district judge knew of party's position, despite no formal objection); *Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976) (formal objection not required and argument not waived, where the court knew the particular action the party desired).

Moreover, a petitioner need not cite below every case and law review article that supports its argument in order to preserve that argument or to cite to such authorities later. The respondents' argument, that petitioner waived the right to cite "institutional analysis" law review articles, lacks any semblance of legal merit.

II.

THIS CASE MERITS REVIEW.

Contrary to respondents' argument, that municipalities should never have independent liability post-*Heller*, that question merits review by this Court.

First, and in addition to the arguments in the Petition, respondents' assertion that pre-*Heller* cases provide no authority on which to base a Petition plainly lacks merit. *Heller* never overruled the cases petitioner cites. Nor does *Heller* reject the legal principle announced by most of the

Courts of Appeal, that a municipality can have liability for a custom or practice even if its employee lacks personal liability.

Second, respondents' citation of cases, which it contends apply its interpretation of *Heller,* merely underscores the split among the circuits, thereby requiring review by this Court. *See Resp't Br. in Opp'n at p. 6.* Third, and tellingly, respondents point to no decision of this Court which engrafts state law requirements of subjective wrongdoing onto the objective test this Court applies to unlawful seizure cases.

III.

PETITIONER HAS NOT MISSTATED THE FACTS.

One could only accept respondents' version of the "facts" if they had obtained criminal convictions of Mrs. Treece and of her husband. But, they did neither. The principal difference between the criminal cases they lost and the civil case against Hochstetler was the lower court's imposition of a requirement that Mrs. Treece prove subjective wrongdoing by Hochstetler. If one can infer anything about what the jury concluded below, it is only that, deprived of evidence concededly admissible against the City, the jury did not find Hochstetler to have acted with subjective malice. Moreover, the evidentiary rulings and the jury verdict were with respect to potential liability of Officer Hochstetler, not as to the City's potential independent liability.

Respondents have also misstated the facts. Mrs. Treece did not seek out Officer Hochstetler; rather, Hochstetler repeatedly contacted her. The centerpiece of the Petition is the allegation of constitutional violations due to the making of false reports and accusations, all adequately supported by the evidence and the outcomes of the criminal cases. This is not a case about bribe solicitation, an issue below only because the Seventh Circuit's decision in *Reed* required that state law subjective wrongdoing also be proven. Under a proper application of unlawful seizure law, no such element would have been necessary to try.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit as prayed.

October 10, 2000

Respectfully submitted,

JOHN J. WITMEYER III
Counsel of Record
Todd S. Corey
Ford Marrin Esposito
Witmeyer & Gleser, L.L.P.
Counsel for Petitioner
Wall Street Plaza
New York, New York 10005
(212) 269-4900